

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 9, 2005

CHARLES G. SUMMERS v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Hickman County
No. 04-5099C Russ Heldman, Judge

No. M2004-02806-CCA-R3-HC - Filed August 12, 2005

The petitioner, Charles G. Summers, filed an application for writ of habeas corpus in the Hickman County Circuit Court. The habeas corpus court summarily dismissed the petition, and the petitioner timely appealed. Upon review of the record and the parties' briefs, we reverse the habeas corpus court's dismissal of the petition and remand for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Reversed and Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JOHN EVERETT WILLIAMS, JJ., joined.

Charles G. Summers, Pro se.

Paul G. Summers, Attorney General and Reporter; Richard H. Dunavant, Assistant Attorney General; and Ronald L. Davis, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The record before us on appeal is scarce. Regardless, in his appellate brief and in his petition for writ of habeas corpus, the petitioner claims that on October 25, 1991, he pled guilty in the Giles County Circuit Court to aggravated arson, selling cocaine, manslaughter, and misdemeanor escape and was sentenced to concurrent sentences of twenty-three years; eleven years; six years; and eleven months, twenty-nine days, respectively. The petitioner contends that he committed the escape while he was being held in jail for the other offenses.

On September 24, 2004, the petitioner filed a pro se petition for writ of habeas corpus. In his petition, the petitioner argued that the "trial court lacked lawful jurisdiction to render the

judgment ordering the escape sentence served concurrent with the other sentences . . . and thereby imposed an illegal sentence.” On November 3, 2004, the trial court summarily dismissed the petition. The petitioner timely appealed to this court, arguing that pursuant to Tennessee Code Annotated section 39-13-605(c) and Tennessee Rule of Criminal Procedure 32(c)(3)(B), he was required to serve the escape sentence consecutively to the other two sentences and, therefore, that his sentence is illegal.

II. Analysis

The purpose of a habeas corpus petition is to contest void and not merely voidable judgments. Archer v. State, 851 S.W.2d 157, 163 (Tenn. 1993) (citing State ex rel. Newsom v. Henderson, 221 Tenn. 24, 424 S.W.2d 186, 189 (1968)). Habeas corpus relief is available only when it appears on the face of the judgment or the record that the trial court was without jurisdiction to convict or sentence the defendant or that his sentence has expired. Archer, 851 S.W.2d at 164. The burden is on the petitioner to establish that the judgment is void or that the sentence has expired. State ex rel. Kuntz v. Bomar, 214 Tenn. 500, 504, 381 S.W.2d 290, 291-92 (1964). A trial court may summarily dismiss a petition for writ of habeas corpus without the appointment of counsel and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions addressed therein are void. Passarella v. State, 891 S.W.2d 619 (Tenn. Crim. App. 1994).

Tenn. Code Ann. § 39-16-605(a) provides that it is “unlawful for any person arrested for, charged with, or convicted of an offense to escape from a penal institution.” Any sentence received for escape must be served consecutively to the “sentence received for the charge for which the person was being held at the time of the escape.” Tenn. Code Ann. § 39-16-605(c). The Tennessee Rules of Criminal Procedure also provide that

[w]here a defendant is convicted of multiple offenses from one trial or where the defendant has additional sentences not yet fully served as the result of the convictions in the same or other court and the law requires consecutive sentences, the sentence shall be consecutive whether the judgment explicitly so orders or not. This rule shall apply:

. . .

(B) To a sentence for escape or for a felony committed while on escape

Tenn. R. Crim. P. 32(c)(3)(B).

We believe that the instant case is similar to McLaney v. Bell, 59 S.W.3d 90 (Tenn. 2001). In McLaney, the petitioner pled guilty to aggravated rape, rape, and third degree burglary, and received concurrent sentences of forty, twenty, and seven years, respectively. Eleven years later, he filed a pro se petition for writ of habeas corpus, alleging that he had been released on bail for the aggravated rape when he committed the rape and burglary offenses and that concurrent sentencing was “in direct contravention of Tenn. Code Ann. § 40-20-111(b) (2000) and Tenn. R. Crim. P. 32(c)(3)(C) and therefore was void.” McLaney 595 S.W. 3d at 92. The trial court summarily dismissed his petition, and this court affirmed the dismissal. However, the supreme court reversed and remanded the case “for the appointment of counsel and a determination whether McLaney committed the latter offenses while he was on bail.” Id. at 95.

The State argues that the petitioner is not entitled to relief in the instant case because Tenn. R. Crim. P. 32(c)(3) states that the “sentence shall be consecutive whether the judgment explicitly so orders or not.” We would agree with the State’s argument if the judgments of conviction were silent as to whether the escape sentence was to run consecutively or concurrently to the other sentences. See Rickey Hogan v. Mills, ___ S.W.3d ___, No. W2004-00182-SC-R11-HC, 2005 Tenn. LEXIS 599, at * 8-9 (Jackson, June 27, 2005). However, the judgments of conviction in this case explicitly state that the escape sentence is to run concurrently with the other sentences. Thus, if the petitioner’s allegation that he was being held in confinement for the aggravated arson, selling cocaine, and manslaughter charges at the time of his escape is true, then the judgments of conviction ordering concurrent sentencing are in direct contravention to Tennessee Code Annotated section 39-16-605(c) and Tenn. R. Crim. P. 32(c)(3) and are void.

As the supreme court held in McLaney, we believe the appellant should be afforded the benefit of counsel and an opportunity to prove his allegations to the habeas corpus court. Therefore, this case is remanded to the habeas corpus court for a determination as to whether the appellant is indigent; the appointment of counsel, if necessary; and if necessary transfer to the Giles County Circuit Court. If the trial court determines that the petitioner escaped from confinement while he was being held for the remaining charges, then the appropriate remedy is that the petitioner be allowed to withdraw his pleas or that he be resentenced for the offenses. See McLaney, 59 S.W.3d at 94-95.

III. Conclusion

Based upon the record and the parties’ briefs, we reverse the judgment of the trial court. The case is remanded to the habeas corpus court for further proceedings consistent with the directives of McLaney v. Bell, 59 S.W.3d 90 (Tenn. 2001).

NORMA McGEE OGLE, JUDGE